

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO.627 OF 2005

Naresh Sharma ...Applicant

Versus

The State of Maharashtra ...Respondent

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Mr.S.D.Nangre for Applicant.

Mr.B.H.Mehta, A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

FEBRUARY 17, 2005.

P.C.

1. Heard Counsel for the parties.

2. Briefly stated, the Applicant was arrested on 7th September 2004 in connection with C.R.No.246 of 2004 registered with Dahisar Police Station for offences punishable under Sections 452, 342, 394, 395, 397, 34, 120-B of the Indian Penal Code ('I.P.C.') read with Sections 3 and 25 of the Arms Act read with Sections 3(1)(ii), 3(2) and 3(4) of the Maharashtra Control of Organised Crimes Act,

1999 ('MOCA').

3. The statutory period for filing charge-sheet under Section 167 of the Criminal Procedure Code, 1973 ('Code') would have ordinarily expired on 5th December 2004. However, no charge-sheet could be filed on account of the file pending before the appropriate Authority for according sanction in respect of offences punishable under MOCA. In that backdrop, report of the Public Prosecutor was submitted on 5th December 2004 requesting for extension of time in terms of provisions under Section 21(4) of the MOCA read with Section 167 of the Code. The said report was considered by the Court and after giving opportunity to the Applicant and other accused, the Court extended the time till 16th December 2004. No charge-sheet was filed till then, nor any formal report was submitted by the Public Prosecutor for seeking further extension giving reasons for further detention of the accused beyond the statutory period to be specified in the said report. On the other hand, an application which came to be filed by the Assistant Commissioner of

Police and Investigating Officer, Dahisar Division, Mumbai, which was presented through Public Prosecutor, clearly asserts that the competent Authority has not accorded the sanction to prosecute the accused as required under Section 23(2) of the MOCA and, to grant permission to file the charge-sheet in the regular Court. As there was no formal report by the Public Prosecutor for extension of time, there was no occasion for the Trial Court to grant further extension. Indeed, the Trial Court ordered the Applicant to be sent to judicial custody till 20th December 2004; and by a detailed order running into about 14 pages, impressed upon the Commissioner as to why it was necessary to accord sanction and that be done at the earliest. This order was passed on 16th December 2004.

4. As no report was filed by the Public Prosecutor for extension of time, Bail Application was filed on 17th December 2004 by the Applicant, asserting that as no charge-sheet has been filed within the extended time, nor there is formal report by the Public Prosecutor for extension of

time, on the other hand, application in writing has been submitted by the Assistant Commissioner of Police presented through the Public Prosecutor that the prosecution intends to file charge-sheet in regular Court only for the offences under the Indian Penal Code, the Applicant ought to be released on bail on such terms and conditions on the ground of default as the Applicant was willing to furnish necessary surety in that behalf. The Court, however, passed no order on the said application. Though in law, it was obliged to do so in view of the exposition of the Apex Court in the case of **Uday Mohanlal Acharya vs. State of Maharashtra as reported in 2001 All.M.R. (Cri.) 713**. The Bail Application was, however, adjourned to 18th December 2004. On 18th December 2004, the Bail Application was once again adjourned to 20th December 2004. Incidentally, in view of the observations made by the Court in its order dated 16th December 2004, the competent Authority accorded sanction in respect of offence punishable under MOCA as required under Section 23(2) of MOCA and which sanction order was produced before the Court on 20th December 2004, when the Bail

Application of the Applicant was being heard. Relying on that circumstance, the Court proceeded to reject the Bail Application on the reasoning that now the charge-sheet has been filed and sanction has also been accorded by the competent Authority.

5. The question is: whether such course was open to the Trial Court. As mentioned earlier, in view of the exposition of the Apex Court in the case of **Uday Acharya (Supra)**, the Court had no option but to release the Applicant on bail on 17th December 2004 in the fact situation of the present case as referred to earlier. The Apex Court in **Uday Acharya's case (supra)**, has re-stated the legal position in the following terms:

"On the aforesaid premises, we would record our conclusions as follows:-

1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days in the whole.
2. Under the proviso to aforesaid

sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the Investigating Agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail, as directed by the Magistrate.
4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the Investigating Agency in completion of the investigation within the specified period, the Magistrate/Court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the Investigating Agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the Investigating Agency

in completing the investigation within the period stipulated.

5. If the accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section 2 of Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorised, and, therefore if during that period the investigation is complete and charge-sheet is filed then upon the so-called indefeasible right of the accused would stand extinguished.
6. The expression 'if not already availed of' used by this Court in Sanjay Dutt's case (supra) must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression 'availed of' if charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section

(2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 of the Code and magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with law laid down by this Court in the case of Mohd. Iqbal v. State of Maharashtra (supra)."
(emphasis supplied)

6. The above exposition applies on all fours to the case in hand, inasmuch as the extended period was to come to an end on 16th December 2004. Neither charge-sheet was filed before that date, nor a formal report has been submitted by the Public Prosecutor for extending the time, giving specific reasons for further detention of the Applicant beyond the statutory period. Moreover, no opportunity was given to the Applicant as to why further time for filing of charge-sheet ought not

to be granted. On the other hand, in the present case, the prosecution itself filed the Application before the Court on 16th December 2004 that as sanction has not been accorded by the competent Authority as required under Section 23 (2) of the MOCA, for which reason, the prosecution would like to file the charge-sheet before the regular Court for offences under I.P.C. In other words, a formal application was placed on record before the Court that the prosecution was not inclined to pursue MOCA charges against the Applicant. In this backdrop, as the Applicant had immediately applied for being released on bail and offered to provide for necessary surety, as may be directed, the Court had no option but to grant the prayer for bail in view of the indefeasible right accrued to the Applicant in the peculiar fact situation of the present case. Instead of allowing the bail application when presented on 17th December 2004, the Trial Court proceeded to adjourn the same to 18th December 2004 and later on to 20th December 2004, awaiting the sanction to be accorded by the Commissioner in the light of the observations made in its order dated 16th December 2004. Indeed, on

20th December 2004, charge-sheet has been filed and sanction accorded by the competent Authority produced before the Court. But that will make no difference because the Applicant, much before that, had applied for being released on 17th December 2004 and in view of the observations of the Apex Court referred to above, the Trial Court could not have defeated the right which had crystalised in favour of the Applicant and which was indefeasible one, by postponing the hearing of the Application. In other words, the order as passed by the Court below on the application which was filed by the Applicant, cannot be sustained in law. If it is so, the same will have to be set-aside and instead, the Application of the Applicant for being released on bail, as was filed by him on 17th December 2004 deserves to be granted.

7. Having regard to the seriousness of the offence, strict conditions should be imposed on the Applicant. According to the learned A.P.P. as the Applicant was involved in similar offences in the past, though acquitted in those cases and it is the prosecution case that the Applicant is the member

of the gang, committing offences which has operated in the past in Mumbai (Pydhonie, Dongri and Dahisar Areas), it would be appropriate to impose condition on the Applicant not to enter the jurisdiction of Commissionerate of Mumbai, New Bombay and Thane, which are adjacent areas and if the Applicant is allowed to move in these areas, is likely to involve in similar offence, besides, likely to influence the prosecution witnesses and the evidence. I find substance in this submission. In the circumstances, besides imposing heavy bail amount, the Applicant while being released on bail, will have to be put to strict conditions as follows:

(a) The Applicant is granted bail in connection with C.R.No.246 of 2004 registered with Dahisar Police Station on executing personal bond in the sum of Rs.1,00,000/- (Rupees One Lakh) with two local sureties in the like amount.

(b) The Applicant shall not influence the prosecution witnesses or tamper with the prosecution evidence in any manner whatsoever.

(c) The Applicant shall not enter the jurisdiction of Commissionerate of Mumbai, New Bombay and Thane during the pendency of the trial, except for attending Court proceedings on the specified dates.

(d) Applicant shall inform about his place of residence to the Investigating Officer as well as to the Trial Court within one week from the date of release. Besides, the Applicant shall report to the local Police Station where he would reside once in fortnight on Saturday between 10.00 a.m. and 2.00 p.m.

(e) The Applicant shall extend full co-operation to the Trial Court for early disposal of the trial and if the Trial Court is of the opinion that the Applicant is responsible for the delay of the trial, that fact be recorded in the Roznama, which will be a ground for cancellation of bail.

8. Application disposed of on the above

terms.

A.M.KHANWILKAR, J.